UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH WILSON PLATER,

Petitioner,

v. **Civil Action No. 9:08-CV-380 (GLS)**

SUPERINTENDENT, Cayuga Correctional Facility,

Respondent.

APPEARANCES: **OF COUNSEL:**

FOR THE PETITIONER:

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FOR THE RESPONDENT:

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GARY L. SHARPE
UNITED STATES DISTRICT JUDGE

ORDER

I. Introduction

Petitioner Joseph Wilson Plater ("Plater" or "Petitioner") is currently an inmate in the custody of the New York State Department of Correctional Services at Cayuga Correctional Facility as a result of a 1995 conviction for first degree burglary and second degree assault (two counts). Petitioner is serving a concurrent indeterminate term of five to fifteen years in prison. *See* Dkt. No. 6, Respondent's Answer in Opposition to the Petition for a Writ of Habeas Corpus ("Answer"), at 1-2; Respondent's Memorandum of Law ("Resp't Mem."), at 1. He commenced this proceeding seeking habeas review of the Cayuga Correctional Facility's Time Allowance Committee ("TAC")'s decision to withhold five years of good time credit based upon Petitioner's failure to complete the prison's Alcohol and Substance Abuse Treatment ("ASAT") program. For the reasons that follow, the petition is **DENIED**.

II. Background

A. Facts

On or about September 28, 2004, the TAC scheduled a hearing concerning the possibility of withholding Petitioner's available good time credits based upon his refusal to participate in the prison's ASAT

program. Resp't Mem. at 2; Dkt. No. 9, Ex. B, Verified Article 78 petition, at 10; Ex. C, Verified Answer, at 2 (and attached exhibit captioned "Cayuga Correctional Facility, Time Allowance Committee Formal Notice", dated September 28, 2004 and signed by Petitioner). The hearing was held on or about September 30, 2004. Dkt. No. 9, Ex. C, at 2.

At the hearing, Petitioner explained that he would not participate in the ASAT program because the program was voluntary and not "the result of any mandatory Directives or Court order." Dkt. No. 1 at Ground One, attached pages at ¶ 2. *See also* Dkt. No. 9, Ex. B at 10. According to Petitioner, he was informed by one of the TAC committee members that because he was "sentenced to the Department of Corrections", he was "State property" and must comply with the prison's directives. Dkt. No. 9, Ex. B at 11.

The TAC recommended to the facility Superintendent that five years of good time credits be withheld based upon Petitioner's refusal to participate in the ASAT program. Dkt. No. 1, attached pages at ¶ 2; Resp't Mem. at 2. The TAC noted that it would reconsider its decision "upon completion" of the recommended treatment programs. Dkt. No. 9, Ex. A. The Superintendent affirmed the TAC's decision on October 1,

2004, and the decision was further affirmed by the Commissioner on October 19, 2004. Pet. at attached pages, ¶ 2; Resp't Mem. at 2; Dkt. No. 9, Ex. A; Ex. C at 2.

B. State Court Proceedings

Petitioner brought an Article 78 proceeding in Supreme Court, Cayuga County, seeking the restoration of his good time credits. *See* Dkt. No. 9, Ex. B. Petitioner argued that the withholding of his good time credits violated due process under the New York and the United States Constitutions, and also violated the United States Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974), because the prison failed to: (1) provide him with an employee assistant at his hearing; (2) provide advanced written notice of the claimed violations leading to the possible withholding of good time credits; (3) provide a written report to the Superintendent; (4) allow him a brief period not exceeding twenty-four hours to prepare for his appearance before the TAC committee; and (5) allow him to call witnesses and present documentary evidence in his defense. *See* Dkt. No. 9, Ex. B, Affidavit, at 4-6. Petitioner further asserted that participation in a substance abuse program was voluntary under New York's Mental Hygiene Law. Dkt. No. 9, Ex. B at Verified

Petition, 12-13; Ex. C at 3-4.

In a decision and order dated January 12, 2006, the Cayuga County Supreme Court denied Petitioner's Article 78 petition. Dkt. No. 9, Ex. D, at 2. The court noted that the decision whether to grant good time credit "is discretionary." *Id*. It further found that good time credits were "a privilege and not a right," and that "[a]n inmate's failure to participate in treatment programs provides a rational basis to withhold petitioner's good time." *Id.* Finally, the court concluded that since the "discretionary decision of the Board of Parole was made in accordance with the law, it is not subject to judicial review", and that Petitioner's claims were "without merit." *Id*.

Petitioner appealed the denial of his Article 78 petition to the New York State Supreme Court, Appellate Division, Fourth Department on or about January 23, 2006. Pet. at Ground One ¶ 8; Dkt. No. 9, Ex. E. In his brief, Petitioner argued that his due process rights were violated when (1) he was not provided with a list of counselors he could choose from to assist him at the TAC hearing; and (2) his due process rights were violated when substance abuse treatment programs, voluntary under the Mental Hygiene Law, were "used against him" to justify withholding of his

good time credits. Dkt. No. 9, Ex. E at 1 (Questions Presented); 6-10. Petitioner also claimed that a form captioned "Time Allowance Notice Assistance Form," indicating that Petitioner declined assistance by a counselor at the hearing, was a forgery. *Id.* at 7.

Respondent argued that Petitioner's claim that he was not provided with a list of counselors he could choose from to assist at the TAC hearing was unpreserved for appellate review because although Petitioner raised the claim in his affidavit in support of an order to show cause, he failed to raise it in his Article 78 petition. Dkt. No. 9, Ex. F, at 5-6. Respondent further asserted that Petitioner failed to object to the lack of assistance at the TAC hearing and, in any event, assistance was unnecesary because Petitioner admitted his failure to participate in the ASAT program based upon his belief that it was voluntary. *Id.* at 6-7. Respondent also argued that although an inmate cannot be forced or coerced into participation in a treatment program, it was "appropriate and rational for DOCS to conclude than an inmate who refuses to take a counselor's recommendation to improve or rehabilitate himself by taking certain programs is not exhibiting good behavior and, therefore, is not entitled to receive a good behavior time allowance." *Id.* at 5.

On July 6, 2007, the Appellate Division "unanimously affirmed" the dismissal of Petitioner's Article 78 petition without further opinion. Dkt. No. 9, Ex. G; *Plater v. Goord*, 838 N.Y.S.2d 456 (N.Y. App. Div., 4th Dep't. 2007). The New York Court of Appeals denied leave to appeal on October 16, 2007. *Id.* at Ex. H; *Plater v. Goord*, 876 N.E.2d 516 (N.Y. 2007).

C. Proceedings in This Court

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 8, 2008. *See* Dkt. No. 1. On October 7, 2008, the Office of the Attorney General for the State of New York, acting on Respondent's behalf, filed a response and memorandum of law in opposition to the petition, along with the relevant state court records. *See* Dkt. Nos. 6-9. Petitioner filed a Traverse on October 30, 2008. Dkt. No. 13.

II. Discussion

Petitioner's only ground for habeas relief is that he was "coerced into attending substance abuse program [sic] in violation of [his] First Amendment Rights[.]" Pet. at 5, Ground One. Specifically, Petitioner argues that his First Amendment rights were violated by the TAC's decision to withhold five years of good time credits after Petitioner refused

to participate in a substance abuse treatment program he believed was voluntary. *Id*. at Ground One; see also attached pages at ¶ 16. Respondent argues that this claim is unexhausted, procedurally barred, and without merit. Resp't Mem. at 7.

A. Exhaustion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires that before a state inmate may petition for habeas review under 28 U.S.C. § 2254, he or she must first exhaust all remedies available in state court unless there is an "absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(i), (ii). This statute "embodies the long-established principle that a state prisoner seeking federal habeas review of his conviction ordinarily must first exhaust available state remedies." *Daye v. Att'y Gen. of State of N.Y.,* 696 F.2d 186, 190 (2d Cir. 1982) (en banc) (citations and footnote omitted). "The exhaustion requirement 'is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings [.]'" *Jimenez v. Walker*, 458 F.3d 130, 148-49 (2d Cir. 2006) (quoting *Rose v. Lundy*, 455 U.S. 509, 518,

(1982)), *cert. denied*, 549 U.S. 1133 (2007). "The chief purposes of the exhaustion doctrine would be frustrated if the federal habeas court were to rule on a claim whose fundamental legal basis was substantially different from that asserted in state court." *Benjamin v. Taylor,* No. 05-CV-902, 2007 WL 2789454, *4 (N.D.N.Y. Sept. 24, 2007)(Kahn, J, adopting Report-Recommendation of Peebles, M.J.)(quoting *Glover v. Bennett*, No. 98-CV-0607, 1998 WL 278272, at *1 (N.D.N.Y. May 21, 1998) (Pooler, D.J.) (quoting *Daye*, 696 F.2d at 192) (footnote omitted)).

To satisfy the exhaustion requirement, a petitioner must do so both procedurally and substantively. Procedural exhaustion requires that a petitioner raise all claims in state court prior to raising them in the habeas corpus petition. Substantive exhaustion requires that a petitioner "fairly present" any federal constitutional claim to the highest state court in the same factual and legal context in which it appears in the habeas petition. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 808 (2d Cir. 2000) (citation omitted); *Sweeney v. Superintendent of Watertown Corr. Facility*, No. 06-CV-0663, 2007 WL 2176987, *5 (E.D.N.Y. Jul. 27, 2007) (citations omitted).

Here, Petitioner challenged the loss of good time credits in his Article 78 petition, but did so in the context of an argument that his state and federal due process rights were violated by the TAC's conduct of the hearing and by requiring participation - i.e., "coercing" participation - in what Petitioner alleges is a voluntary program in violation of New York's Mental Hygiene Law. *See* Dkt. No. 9, Ex. B. The Cayuga County Supreme Court analyzed the petition based upon these claims, noting Petitioner's argument was that Respondent "violated his due process rights and the New York Mental Hygiene Law." *Id.* at Ex. C at 2. On appeal, Petitioner asserted two grounds for relief: (1) that his procedural due process rights were violated when he was not given a list of correctional counselors from which to choose an assistant for the TAC hearing; and (2) his procedural due process rights were violated when "voluntary programs" were "used against him." *Id.* at Ex. E at i; 6-10. Petitioner never raised a First Amendment claim of any kind in his Article 78 petition, or in any other state court proceeding, and thus never alerted the state courts to such a claim. Petitioner's First Amendment claim is therefore unexhausted.

2. Procedural default

Petitioner's unexhausted claim is also procedurally defaulted. Under New York law, the proper way to challenge the loss of good time credits is the commencement of an Article 78 proceeding and exhaustion of that proceeding in the state courts. *See Van Gorder v. Boucaud*, No. 08-CV-442, 2008 WL 2858678, *1 (N.D.N.Y. Jul. 22, 2008)(Mordue, C.J.)(citing *Scales v. New York State Div. of Parole*, 396 F. Supp. 2d 423, 428 (S.D.N.Y. 2005)). Petitioners seeking Article 78 review of a prison's good time credit determination must commence the proceeding " 'within four months after the determination to be reviewed becomes final and binding upon the petitioner.' " *Walton v. New York State Dep't of Corr. Srvcs*, 863 N.E.2d 1001, 1005 (N.Y. 2007)(quoting N.Y. C.P.L.R. §217[1]). *See Morales v. Selsky*, 733 N.Y.S.2d 760, 761 (N.Y. App. Div., 3d Dep't. 2001)(noting the four-month statute of limitations period applicable to Article 78 petitions). An administrative determination becomes " 'final and binding' when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies." *Walton*, 863 N.E.2d at 1005.

Here, the TAC's decision to withhold good time credits became final on October 19, 2004, when Respondent affirmed its decision. Petitioner's

time to seek Article 78 review expired four months later, on or about February 19, 2005. He cannot return to state court to file another Article 78 proceeding challenging the same revocation of good time credits because it would be time-barred. *See Zaire v. West*, No. 04-CV-6217L, 2008 WL 4852677, *6 (W.D.N.Y. Nov. 6, 2008)(noting that state courts "strictly and regularly apply the four-month limitation provision of Article 78 to proceedings seeking restoration of good time.")(quoting *Perry v. Woods*, No. 07-CV-0341, 2007 WL 2973585, *3 (E.D.N.Y. Oct. 9, 2007)); *Muniz v. David*, 791 N.Y.S.2d 733, 733-34 (N.Y. App. Div., 3d Dep't. 2005)(petitioner's failure to commence Article 78 proceeding until ten months after the challenged final determination warranted dismissal of the petition as time-barred); *Lynch v. Goord*, 724 N.Y.S.2d 367 (N.Y. App. Div., 3d Dep't. 2001) (dismissing an Article 78 petition filed after the four-month limitations period passed as time-barred). Since there is an absence of available state court corrective process to address Petitioner's claim, it is therefore "deemed exhausted" but procedurally defaulted. *See Aparicio v. Artuz*, 269 F.3d 78, 90-91 (2d Cir. 2001); *Spence v. Superintendent, Great Meadow Corr. Fac.*, 219 F.3d 162, 170 (2d Cir. 2000); *Senor v. Greiner*, No. 00-CV-5673, 2002 WL 31102612, at *10

(E.D.N.Y. Sept. 18, 2002).

Accordingly, the Court may not engage in habeas review of the claim unless Petitioner demonstrates either (1) good cause for and actual prejudice resulting from his procedural default, or (2) that the denial of habeas relief would leave unremedied a "fundamental miscarriage of justice," *i.e.*, that the petitioner is actually innocent. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Coleman v. Thompson*, 501 U.S. 722, 748-50 (1991); *Fama,* 235 F.3d at 809; *Garcia v. Lewis*, 188 F.3d 71, 76-77 (2d Cir. 1999); *Spencer v. Mantello*, No. 01-CV-0112, 2007 WL 446013 at *7 (N.D.N.Y. Feb. 7, 2007)(McAvoy, S.J., adopting Report-Recommendation of Bianchini, M.J.). This second exception is intended for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also House v. Bell*, 547 U.S. 518, 535-39 (2006). If a showing of actual innocence is made, a habeas court "may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496.

To establish "cause" sufficient to excuse a procedural default, a petitioner must show that some objective external factor impeded his or

her ability to comply with the relevant procedural rule. *Coleman*, 501 U.S. at 753 (citing *Murray*, 477 U.S. at 488); *Clark v. Perez,* 510 F.3d 382, 393 (2d Cir. 2008), *cert. denied* 129 S. Ct. 130 (2008); *Restrepo v. Kelly*, 178 F.3d 634, 639 (2d Cir. 1999). Examples of such external mitigating circumstances can include "interference by officials," ineffective assistance of counsel, or that "the factual or legal basis for a claim was not reasonably available to counsel" at trial or on direct appeal.[1] *Murray*, 477 U.S. at 488.

Petitioner has failed to allege or establish cause for his failure to exhaust his First Amendment claim. To the extent that Petitioner's papers could be read to assert an argument that his claim should not be procedurally defaulted because he is "unqualified" and "indigent" and could not perfect his claim without assistance from counsel, that claim fails. *See* Dkt. No. 13 at 4. The Second Circuit has held that ignorance does not constitute "good cause" to excuse procedural default. *See Washington v. James*, 996 F.2d 1442, 1447 (2d Cir.1993) ("Ignorance or inadvertence will not constitute 'cause' " for a petitioner's failure to raise a

[1]It should be noted, however, that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman*, 501 U.S. at 753 (quoting *Murray,* 477 U.S. at 488).

federal habeas claim on direct state appeal), *cert. denied* 510 U.S. 1078 (1994). *See also Fink v. Bennett*, 514 F. Supp. 2d 383, 389 (N.D.N.Y. 2007)(McCurn, S.J.)(noting that "[t]he mere failure of a petitioner to be aware of a particular area of the law ... does not constitute 'cause' " for a stay to exhaust claims in state court); *Stephanski v. Superintendent, Upstate Corr. Fac.*, 433 F. Supp. 2d 273, 279 (W.D.N.Y. 2006)("in the context of procedural default, a petitioner's allegation that he [sic] *pro se* and inexpert in the law does not provide sufficient 'cause' to excuse the failure to raise a claim in the proper state court tribunal."); *Santiago Gonzalez v. United States*, 198 F. Supp. 2d 550, 554 (S.D.N.Y. 2002) ("*pro se* status and ignorance of the law" do not constitute cause). Since Petitioner has not established cause for his procedural default, the Court need not decide whether he suffered actual prejudice, because federal habeas relief is generally unavailable as to procedurally defaulted claims unless *both* cause and prejudice are demonstrated. *Stepney v. Lopes*, 760 F.2d 40, 45 (2d Cir. 1985); *Staley v. Greiner*, No. 01-CV-6165, 2003 WL 470568, at *7 (S.D.N.Y. Feb. 6, 2003)(*citing Stepney*), *Raymond v. David,* No. 04-CV-796, 2008 WL 2561997, * 4 (N.D.N.Y. Jun. 24, 2008)(Hurd, J.).

There is also no indication that Petitioner was actually innocent of

the conduct that gave rise to the disputed good time allowance denial. To the contrary, Petitioner admits that he refused to participate in the ASAT program based upon his belief that participation in the program is voluntary. *See* Dkt. No. 1 at 5. Thus, there is no basis to conclude that the failure to consider the merits of his claim would result in a fundamental miscarriage of justice. *House,* 547 U.S. at 535-39; *Schulp v. Delo*, 513 U.S. 298, 327 (1995); *Spence*, 219 F.3d at 170. Accordingly, Petitioner's First Amendment challenge to the loss of good time credits is procedurally barred and his petition is dismissed. *See Benjamin,* 2007 WL 2789454, *4-6 (N.D.N.Y. Sept. 24, 2007)(dismissing habeas petition where petitioner claimed that the prison facility improperly withheld good time credits based upon petitioner's failure to participate in certain recommended treatment programs because the claim was deemed exhausted but procedurally defaulted).[2]

[2] The Court also notes that Petitioner has not alleged how any of the First Amendment's guarantees have been impinged by TAC's decision to withhold good time credit based on his failure to participate in treatment programs. Petitioner quotes case law in his Traverse standing for the proposition that the government may not coerce anyone to participate in religion or its exercise. *See, e.g.,* Dkt. No. 13, at 3-4. But he never argued in state court that his refusal to participate in the ASAT program was based on an argument that the program violated his religious rights, *i.e.*, his right to be free from coerced participation in religion or prohibition on the free exercise of religion. Nor does he now explain how participation in these treatment programs would violate his right to religious freedom. Thus, Petitioner's procedurally defaulted First Amendment claim is also vague and conclusory. *See, e.g.*, *Brown v. People of the State of New York*, No. 04-CV-1087, 2006 WL 3085704, *7 (E.D.N.Y. Oct. 30, 2006)("A habeas petition may be denied 'where the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably

III. Certificate of Appealability

For the reasons set forth above, the petition for a writ of habeas corpus filed by Petitioner is dismissed. No certificate of appealability shall issue because he has failed to make a "substantial showing of a denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2)("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."); *see also Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000), *cert. denied* 531 U.S. 783 (2000).

Accordingly, after reviewing petitioner's submissions and the relevant law, and for the reasons stated above, it is

ORDERED that

1. The petition for a writ of habeas corpus (Dkt. No. 1) is **DISMISSED**; and

2. The Clerk of the Court is directed to file judgment accordingly and serve a copy of this Order on Petitioner and Respondent in accordance

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false or patently frivolous.' ")(quoting United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970); *Skeete v. People of New York State*, No. 98 Civ. 5384, 2003 WL 22709079, *2 (E.D.N.Y. Nov. 17, 2003)("vague, conclusory and unsupported claims do not advance a viable claim for habeas corpus relief.")(citation omitted).

with the Local Rules.

IT IS SO ORDERED.

Dated: March 2, 2009